IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 77 of 1985

For Approval and Signature:

Hon'ble CHIEF JUSTICE MR DM DHARMADHIKARI
and
Hon'ble MR.JUSTICE A.R.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

COMMISSIONER OF INCOME-TAX

Versus

SHASHI THEATRE PVT. LTD.

Appearance:

MR Mr. Manishi J. Shah for JP SHAH for Petitioner

Mr. Akil Kureshi for Respondent No. 1

CORAM : CHIEF JUSTICE MR DM DHARMADHIKARI
and
MR.JUSTICE A.R.DAVE

Date of decision: 05/09/2000

ORAL JUDGEMENT (Per D.M. DHARMADHIKARI, C.J.)

#. In this reference under Section 256(1) of the Income Tax Act, 1961, at the instance of the Department, the following two questions have been referred for answer by this Court:

"1. Whether, on the facts and circumstances of the case, the C.I.T. was not correct in law in withdrawing the allowance granted by the I.T.O. under power given in section 263 of the I.T.Act, 1961?

2. Whether, on the facts and circumstances of the case the Tribunal correct in law in taking the view that I.T.O's order had merged in the Appellate order and therefore the revision order could not be passed?"

#. The factual background leading to the above reference is as under:-

The assessee has taxable income from business of running theatre in the name and style of Shashi Theatres Private Limited, Mehsana. In his return for the assessment year 1980-81, he claimed investment allowance under Section 32-A of the Income Tax Act for the following items:

Items	Rs.
1. Plaster of Paris	48,043
2. Machinery	1,60,831
3. A.C.Plant	40,089
4. Generator A/c.	2,324
5. Electric Fittings	96,927
6. Furniture	1,19,919
7. Accoustic	67,291
TOTAL	5,35,424

#. The assessing officer allowed investment allowance for items - machinery, A/c plant, Generator A/c. and electrical fittings.

#. The assessee went up in appeal under Section 246 of the Act. The ground among others urged in Appeal was against non grant of investment allowance on items of plaster of paris, furniture and acoustics to the extent of the amounts mentioned against each of the said items. In considering the claim for grant of investment allowance for the aforesaid items, the Commissioner of Income-Tax (Appeals) in his order dated 23-12-1982 took a

decision in favour of the assessee that the assessee is entitled to investment allowance on the said items as well. The decision of Commissioner of Income-Tax (Appeals) as contained in paragraph 3 of the order reads as under:-

> "As regards the claim for investment allowance, the Income-Tax Officer has allowed the same on machinery and plant costing Rs.3,00,171/-. No reason has been given for not allowing the deduction u/s. 32-A in respect of the balance amount claimed by the assessee. It appears that the Income-Tax Officer was of the view that the theatre, chairs, plaster of paris, acoustics and intercom telephone are not coming within the definition of the term `Plant and Machinery' and hence investment allowance is not admissible thereon."

#. After the decision on the Appeal in favour of the assessee on his claim for investment allowance and grant of the same for all items, the another Commissioner of Income-Tax (Appeals) took up the matter in revision under Section 263 of the Act stating that the order of the Assessing Officer to the extent of granting investment allowance for items - machinery, A/C. Plant, Generator A/c. and Electrical Fittings was erroneous. The ground urged in support of revision is that cinema theatre owned by the assessee is not a `small scale industry' to be eligible for investment allowance. Against the order of Commissioner of Income-Tax passed in revision under Section 263 of the Income-Tax Act, the assessee approached the Income-Tax Appellate Tribunal. The Tribunal concluded that the revisional order of the Commissioner of Income-Tax is invalid.

#. It is on the above facts that the two questions of law have been referred to this Court for answers by us. Learned counsel appearing for the assessee Manish J. Shah by relying on paragraph 3 of the order of the Commissioner of Income-Tax (Appeals) contends that the question of grant of investment allowance on items disallowed by the assessing officer as also on items allowed by the assessing officer came up for consideration and decision before the appellate authority. The Tribunal was therefore, right in holding that the assessment order having merged into the appellate order, the order of the assessing officer could not be made subject of revision by the Commissioner under Section 263 of the Act in view of the bar contained in subclause (c) of subsection (1) of Section 263. Reliance

is placed on decision of Supreme Court in Commissioner of Income-Tax vs. Shri Arbuda Mills Limited (1998) 231 ITR 50.

#. Learned counsel appearing for the revenue on the other hand submitted that in the decision of the Commissioner of Income-Tax (Appeals) contained in paragraph 3 of its order, there is no discussion with regard to the items allowed for grant of investment allowance by the assessing officer. The Appellate Authority merely held that for other items there was no apparent reason for not granting the investment allowance. It is argued that the aspect of the matter as to whether a theatre, being not a small scale industry, any investment allowance was admissible or not, was not a question directly considered or decided by the Apex court. On behalf of the revenue, reliance is placed on the decision of this Court in the case of C.I.T. vs. Paushak Limited reported in (1997) 227 ITR 216.

#. After carefully considering the contentions advanced by the learned counsel for the parties, we have formed an opinion that the present case is distinguishable on facts from the decision of this Court in the case of Paushak Limited (supra) and the decision of the Supreme Court in Shree Arbuda Mills Ltd. (supra). The provisions contained in clause (c) of Explanation to Section 263(1) of the Act deserve to be noted:

> "(c) where any order referred to in this sub-section and passed by the Assessing Officer had been the subject-matter of any appeal filed on or before or after the 1st day of June, 1988, the powers of the Commissioner under this sub-section shall extend and shall be deemed always to have extended to such matters as had not been considered and decided in such appeal."

#. The above provisions has been inserted by amendment by Finance Act 1989 with effect from 1-6-1988. The said provision has been given retrospective effect to the appeals filed on or before or after the 1st day of June, 1988. In view of the retrospective legislation, clause (c) of Explanation to Section 263(1) is attracted to the case in hand. The only question that remains for our consideration is whether the last part of clause (c) of Explanation to Section 263(1) is attracted in the case or not, particularly, whether the subject matter in question `having been considered and decided' in the appeal, the revisional jurisdiction under Section 263(1) could be invoked in this case or not.

##. From the portion of the order of the Commissioner of Income-Tax (Appeals) contained in paragraph 3 quoted above, we find that he has taken note of the fact that on some of the items nos. 2, 3, 4 and 5 investment allowance in the value of Rs. 3,00,171/was allowed. The Commissioner of Income-Tax (Appeals) then holds that in view of grant of investment allowance for the aforesaid sum on above mentioned items, there was no justification or reason not to allow the investment allowance for the other items, such as furniture, acoustics and plaster of paris.

##. On plain reading of the order of the Commissioner of Income-Tax (Appeals) in paragraph 3, the contention advanced on behalf of the Revenue cannot be accepted that the subject matter of grant of investment allowance to the assessee for all the items including the disputed items under consideration before us, neither came up for consideration nor decided by him. What we find is that for considering grant of investment allowance for items which were rejected by the assessing officer, it was necessary to go into the question of validity of the grant of investment allowance for items already made admissible by the assessing officer. The total claim for investment allowance in the return of the assessee in the sum of Rs. 5,35,434/was before the Appellate Authority. It is true that against the order of the assessing officer there is no appeal provided to the revenue but in the assessee's appeal the department was a party. The ground that on all items no investment allowance should be granted as the `theatre' does not fall in the definition of `small scale industry' was ground available to the revenue and could and ought to have been raised before the Appellate Authority. Under the aforesaid circumstances, it has to be held that the grant of investment allowance on all the items which were granted and or rejected by the assessing officer was for consideration and decision before the appellate authority. In such view of the matter, in accordance with clause (c) of Explanation to Section 263(1) the revisional power did not extend to matters on which the appellate authority had bestowed consideration and given decision.

##. The decision of Paushak Limited (supra) of Gujarat High Court such were not the facts as discussed above. The decision of Supreme Court in Shree Arbuda Mills (supra) is only on the question of giving effect to the retrospective legislation contained in clause (c) of Explanation to Section 263(1).

##. As a result of the discussion aforesaid, the two questions referred to us are answered thus:

In the facts and circumstances of the case, the Commissioner of Income-Tax was not correct in law in withdrawing the allowance granted by the Income Tax Officer under power given under Section 263 of the Income Tax Act.

Our answer to question no. 2 is that irrespective of doctrine of merger, in accordance with last part of clause (c) of Explanation to Section 263(1), since to all items for grant of investment allowance, the appellate authority had given its due consideration and decision, therefore, the order of the assessing authority could not have been revised under Section 263 of the Act.

Having thus answered the two questions, the present reference stands disposed of.

In the circumstances, however, we make no order as to costs.

(D.M. DHARMADHIKARI, C.J.)

(A.R. DAVE, J)

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